FCC 18-131
MB Docket No. 05-311

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Implementation of Section 621(a) of the Cable	)	MB Docket No. 05-311
Communications Policy Act of 1984 as Amended	)	
By the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

COMMENTS OF THE CITY OF AUSTIN, TEXAS
Submitted November 14, 2018

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The City of Austin ("the City" or "Austin) files these comments in response to the Second Further Notice of Proposed Rulemaking released on September 25, 2018 in the above entitled proceeding. In addition to these comments, the City endorses the comments submitted by the United States Conference of Mayors, the National League of Cities, the National Association of Telecommunications Officers and Administrators, and the Texas Coalition of Cities on Franchised Utility Issues.

Introduction

The City of Austin fears that the Commission's proposals in this proceeding pose a threat to public, educational, and governmental (PEG) stations as well as to broadband connections provided to schools and libraries as part of local and statewide franchise agreements. PEG and educational connections have provided important benefits to Austin and communities throughout the nation by helping ensure greater access to local government proceedings, providing a platform for important community information exchange, and helping ensure that all Americans have broadband access at schools and libraries.

Among the six purposes of the Cable Communications Act outlined by Congress, the City would point the Commission to the second and fourth purposes:

> *"(2) establish franchise procedures which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community…*
>
> *… (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"*[1]

The City strongly believes that franchise obligations that support PEG channels and programming are key elements that meet those statutory purposes which is why Congress allowed for franchise obligations and specifically outlined their use to support PEG and to meet

[1] 47 USC 521

other community information needs. Congressional intent in this area is further confirmed a few pages later by a clear statement of policy:

> *"It is the policy of Congress in this Act to (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media;"*[2]

Indeed, in an age of globalization and media consolidation (consolidation in part encouraged by the Commission's hands-off approach to broadcast ownership regulation[3]), PEG channels are more important than ever to ensure that cable customers have access to community information and to a wide array of local viewpoints.

In Austin, the City collects a five percent franchise fee plus an additional one percent for capital expenditures related to the PEG channels. These fees are collected under the statewide franchise law, commonly referred to as SB 5. While SB 5 limited local control and capped local fees for franchise obligations, we are now 13 years into its regime and it has worked well for Austin. It allows the City to collect reasonable compensation for the use of public rights-of-way and to fund PEG and other public services while also allowing access to new cable providers, which has improved consumer choice, service, and reliability. The system is working well in Texas and the City urges the Commission to proceed carefully in this matter, with an eye to the full implications of its decisions.

At the broadest level, the City views this Second Further Notice of Proposed Rulemaking as yet another Commission overreach. This overreach is compounded by the clear evidence that

[2] 47 USC 521 note
[3] See *The Growth of Sinclair's Conservative Media Empire*, The New Yorker, October 22, 2018

the Commission's action in this proceeding is a solution in search of a problem. For evidence, one need look no further than what has happened since March 5, 2007, when the Commission issued the first order in this proceeding outlining new regulations restricting local franchising authorities. That first order was followed by seven years of Commission inaction on petitions for reconsideration, then a 2015 rejection of reconsideration of the first order, and then another two years of litigation in which the Sixth Circuit Court of Appeals ordered the Commission back to the drawing board for a large portion of the regulation.

During that time, we have seen an explosion in telecommunications, video, and information service offerings and major increases in the speed and quality of those services. On March 5, 2007, consumers in most large, urban communities had one option for cable service, a situation that seems quaint a mere decade later. Nevertheless, this proceeding is largely based on the assumption that local franchising authorities operating under pre-2007 regulations present a major if not insurmountable obstacle to competition in the communications marketplace and to investments in communications infrastructure. Given the realities of the current marketplace, the City finds that assumption suspect at best, a suspicion exacerbated by the fact that the previous decade's increases in consumer choice, quality, and speed have been more evident in large urban areas where cable franchising is most ubiquitous. In addition, these gains have been most pronounced for cable customers, perhaps the communications mode most subject to local regulation and that pays the closest to fair market value for the use and management of valuable public property.

The City feels compelled to state the obvious: this Second Further Notice of Proposed Rulemaking comes at the same time that the Commission is seeking to grant companies deploying small cell 5G infrastructure favorable (almost unimpeded and nearly cost-free!) access to public rights-of-way. With all due respect, the City can only conclude that this Second Further Notice of Proposed Rulemaking is nothing more than a sop to incumbent cable providers, an effort to reduce costs associated with their use of the rights-of-way even though the Cable Act clearly envisions they will bear those costs. The disparity may show that the treatment of wireless was wrong but that treatment cannot justify the action the Commission proposes to take here.

State Franchising Regulation (Paragraph 32 of Notice)

Although these questions are the last ones posed in the Second Further Notice of Proposed Rulemaking, the City responds to them first as the Commission's conclusions here pose the greatest threat to the City and its residents. In Austin, the City collects a five percent franchise fee plus an additional one percent for capital expenditures related to the PEG channels. These fees are collected under the statewide franchise law, commonly referred to as SB 5. While SB 5 limited local control and capped local fees for franchise obligations, we are now 13 years into its regime and it has worked well for Austin. It allows the City to collect reasonable compensation for the use of public rights-of-way and to fund PEG and other public services while also allowing access to new cable providers, which has improved consumer choice, service, and reliability. The

system is working well in Texas and the City urges the Commission to proceed carefully in this matter, with an eye to the full implications of its decisions.

Is there any statutory basis to maintain the distinction between state-level franchising actions and local franchising actions?

Statewide franchising was rare when the statute was enacted, so it stands to reason that the statute does not go to great lengths to distinguish between state-level and local franchising. However, the City would argue that NCTA's assertion[4] that the Commission should expand this order to state-level franchises is not supported by the record in Texas.

SB 5 allows local franchising authorities to collect a one percent fee to support PEG capital purchases to help communities meet important and clearly defined statutory goals and purposes. However, there is no evidence that the one percent fee has had an adverse impact on cable investment and consumer choice in Texas. On the contrary, since the enactment of SB 5 the number of companies competing for voice, video, and broadband in Austin has doubled from two to four with a growing number of new "over the top" video providers competing for the traditional cable television business.

Do state-level franchising actions or state regulations governing the local franchise process today impede competition or discourage investment in infrastructure that can be used to provide services, including video, voice, and broadband Internet access service, to consumers?

[4] FCC *Second Further Notice of Proposed Rulemaking, MB Docket No. 05*-311, Footnote 155

No. On the contrary, since the enactment of SB 5, broadband speed in Austin has more than tripled up to 1-gigabit provided by all carriers at prices previously charged for much slower speeds

Cable-Related, In-Kind Contributions (Paragraphs 16-31 of Notice)

Paragraph 16-18

The City agrees with the Commission's tentative conclusions in these paragraphs. In *Montgomery County*, the Sixth Circuit Court of Appeals found that the Commission's determination that the statute allows the Commission to treat "in-kind" services as franchise fees was not supported by an explanation:

"…the FCC has offered no explanation as to why Local Regulators' structural arguments are, as an interpretive matter, incorrect. And apart from a fleeting reference in the Reconsideration Order, the FCC has not even defined what "in-kind" means.[5]

The City believes that the Commission has still not met that standard in this most recent proposal. Indeed, the Commission in this proposal does not adequately address a primary contention raised by local franchising authorities in *Montgomery County* and supported by the Court: that treating cable-related franchise obligations *"would undermine various provisions of the Act that allow or even require the Local Regulators to impose cable-related obligations as part of their cable franchises."*[6] Instead, the Commission cites portions of the statute outlining

[5] United States Court of Appeals for the Sixth Circuit, *Montgomery County, Maryland v. FCC*
[6] United States Court of Appeals for the Sixth Circuit, *Montgomery County, Maryland v. FCC*

franchise fees while continuing to ignore portions of the statute that impose obligations on local franchising authorities.

The City would add that the Commission takes an all or nothing approach to the question of cable-related franchise obligations and those that are not cable related. The Commission argues that the statute does not allow it to make such a distinction. As outlined above, the City disagrees, given the obligations that the statute imposes on local franchising authorities related to the public. In addition, the City would note that nothing in the statute appears to prohibit the Commission from differentiating between cable-related franchise obligations and those that are not cable related. The City would argue that the Commission's failure to take this approach is part of a pattern: namely to read statutes in a manner that most benefits industry, at the expense of local governments, consumers, and the public.

Surely, the Commission's legions of lawyers could develop an interpretation of the statute that allows the Commission to address the issue of supposedly outrageous local franchising authority demands for franchise obligations not related to cable while preserving cable-related franchise obligations. On the issue of supposedly outrageous local franchising authority demands for fees that are not cable related, the City would remind the Commission that extreme examples usually make for poor policy. If ever a situation called for a measured public policy proposal, this would certainly be it.

Paragraph 19

The City agrees with the Commission's conclusion that PEG capital costs required by the franchise are cable-related contributions excluded from the five percent cap. The language in 47 USC 542(g)(2)(C) could not be any clearer:

"(2) the term "franchise fee" does not include-

(C) in the case of any franchise after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[7]

Paragraph 20

As outlined in our comments regarding paragraphs 16-18, the City believes that the Commission is purposefully choosing to use a biased interpretation of the statute regarding cable-related franchise obligations. On this specific issue, the City would point out that the statute specifically separates fees related to the use of public, educational, and governmental channels from franchise fees:

"(c) Itemization of subscriber bills

Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to Section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which it is paid.

[7] 47 USC 542

(2) The amount of the total bill assesses to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.[8]

Through this language, Congress clearly outlined a separation between franchise fees and cable-related franchise obligations. Combined with the obligations the statute imposes on local franchising authority, this language makes a strong case for leaving cable-related franchise obligations outside of the five percent franchise fee.

Paragraph 21

The City agrees that the cost of build out requirements under a franchise should not be counted towards the five percent cap. As outline above, the City believes that the statute provides the Commission the authority to leave public, education, and governmental channel costs outside of the five percent. The City also believes that institutional networks and other services to schools, libraries, and other community institutions provided as part of a franchise agreement should be excluded from the five percent.

Paragraph 22

Austin does not have local franchising, and the statewide franchise does not impose any barrier to entry or discourage investment by competing service providers.

[8] 47 USC 542

Paragraph 23

The City does not negotiate in-kind fees and services since these are all covered by the state franchise law.

Paragraph 24

The City agrees that the cost of build out requirements under a franchise should not be counted towards the five percent cap. As outline above, the City believes that the statute provides the Commission the authority to leave PEG channel costs outside of the five percent. The City also believes that institutional networks and other services to schools, libraries, and other community institutions provided as part of a franchise agreement should be excluded from the five percent.

The City cannot fail to point out that in this paragraph the Commission is proposing to price the use of channels for PEG programming at fair market value. This determination comes at the same time that the Commission is setting caps on the fees local governments can collect from small cell infrastructure use of public rights-of-way. Through the combination of this proposal and its order on small cell fees, the Commission appears to be elevating the value of while minimizing the value of public rights-of-way. The City would remind the Commission that while cable channels are certainly valuable property, public rights-of-way owned by Austin and other cities serve as the conduits for the bulk of our nation's commerce and transportation and as the home of water, sewer, electricity, natural gas, and the other utilities that serve as the foundation of modern, civilized society. They are complex assets and proper management of them is critical to the economy, mobility, and public health and safety.